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No. 03-167

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CARLOS DOMINGUEZ BENITEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

DAN HIMMELFARB
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, in order to show that a violation of Federal Rule of Criminal Procedure 11 constitutes reversible plain error, a defendant must demonstrate that he would not have pleaded guilty if the violation had not occurred.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 310 F.3d 1221. A prior opinion of the court of appeals (Pet. App. 21a-23a) that was withdrawn, and then partially reinstated, is unpublished but is reported at 30 Fed. Appx. 706.

JURISDICTION

The initial judgment of the court of appeals was entered on January 29, 2002. The subsequent judgment of the court of appeals was entered on November 25, 2002. A petition for rehearing was denied on May 6, 2003 (Pet. App. 24a-25a). The petition for a writ of certiorari was filed on August 4, 2003, and was granted

on December 8, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES INVOLVED

1. At the time respondent pleaded guilty, Rule 11(e) of the Federal Rules of Criminal Procedure (1989), titled "Plea Agreement Procedure," provided, in relevant part, as follows:

> **(1) In General.** The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do * * * the following:
>
> * * * *
>
> **(B)** make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court[.]
>
> * * * *
>
> **(2) Notice of Such Agreement.** If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. * * * If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.[1]

2. At the time the court of appeals issued its decision, Rule 52(b) of the Federal Rules of Criminal Procedure (1944), titled "Plain Error," provided as follows: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."[2]

STATEMENT

Following a guilty plea, respondent was convicted in the United States District Court for the Central District of California of conspiracy to possess with intent to distribute at least 500 grams of methamphetamine, in violation of 21 U.S.C. 846 and 841(a)(1). He was sentenced to 120 months of imprisonment, to be followed by five years of supervised release. The court of appeals reversed respondent's conviction and remanded for further proceedings.

1. In early May 1999, a confidential informant (CI) working with law enforcement authorities contacted respondent and negotiated a purchase of several pounds of methamphetamine. On May 6, 1999, respon-

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[1] The current versions of these provisions, which are substantively identical in relevant respects, are set forth in Fed. R. Crim. P. 11(c)(1)(B), (c)(2), and (c)(3)(B). The version of Rule 11 in effect at the time of the plea and the current version of Rule 11 are reproduced in their entirety at Pet. App. 37a-42a and Pet. App. 42a-47a, respectively.

[2] Six days after the court of appeals' November 25, 2002, decision, an amendment to Rule 52(b) took effect. The change is "stylistic only." Fed. R. Crim. P. 52 advisory committee note (2002 Amendments). The version of Rule 52 in effect at the time of the plea and the current version of Rule 52 are reproduced in their entirety at Pet. App. 42a and Pet. App. 47a-48a, respectively.

dent met with the CI and provided him with a sample of the drug. After the meeting, which was monitored by law enforcement agents, the CI made arrangements with respondent to buy a larger quantity. PSR ¶¶ 16-19.

On May 13, 1999, respondent and two co-defendants drove to a restaurant in Anaheim, California, where the methamphetamine was to be delivered to the CI. Respondent got out of the car with one of his co-defendants, who was carrying a plastic shopping bag, and the two men then got into the CI's car. Minutes later, agents conducting surveillance responded to the CI's signal and arrested respondent and his co-defendants. When the agents searched the co-defendant's shopping bag, they found a plastic bag and a shoe box, which collectively contained more than a kilogram of methamphetamine. PSR ¶¶ 20-27.

During a post-arrest interview, respondent admitted that he had sold methamphetamine to the CI on the two occasions described above. Respondent also provided information about where he had gotten the drugs and about his role and the role of his co-defendants. PSR ¶¶ 30-33.

2. On May 28, 1999, a grand jury in the Central District of California returned an indictment charging respondent and his co-defendants with conspiracy to possess with intent to distribute more than 500 grams of methamphetamine, in violation of 21 U.S.C. 846 and 841(a)(1) (Count 1), and possession with intent to distribute 1,391 grams of a mixture or substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. 841(a)(1) (Count 2). J.A. 35-38. A conviction for an offense involving at least 500 grams of a mixture or substance containing methamphetamine is punishable by a minimum prison term of ten years and

a maximum prison term of life. See 21 U.S.C. 841(b)(1)(A)(viii), 846.

3. On September 8, 1999, approximately six weeks before trial was scheduled to begin, respondent sent the district court a letter requesting new counsel. J.A. 41, 43. The asserted basis for the request was that respondent's court-appointed lawyer had been encouraging him to accept a plea offer that he did "not feel [was] appropriate." J.A. 41. At a status conference on October 7, 1999, respondent advised the district court that "[t]he only thing I'm looking for is * * * a better deal"; acknowledged that he was seeking "a disposition of [his] case other than trial"; and added that "[a]t no time have I decided to go to any trial." J.A. 46-47. At the same conference, respondent's counsel confirmed that his client "doesn't want a trial." J.A. 51. The district court denied respondent's request for new counsel. J.A. 52-53.

4. On October 12, 1999, respondent executed a written, "type B," plea agreement, Pet. App. 26a-36a, in which he agreed to plead guilty to Count 1 of the indictment, *id.* at 26a. In a type B agreement, the government "agrees to recommend (or not oppose the defendant's request for) a particular sentence." *United States* v. *Hyde*, 520 U.S. 670, 675 (1997).[3] The agreement contained a number of stipulations, including the stipulation that respondent should receive a two-level reduction in his offense level under the "safety valve" provisions of the Sentencing Guidelines. Pet.

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[3] At the time of respondent's plea, this type of agreement was described in Fed. R. Crim. P. 11(e)(1)(B) (1989). It is now described in Fed. R. Crim. P. 11(c)(1)(B).

App. 29a.[4] The parties, however, agreed only that respondent satisfied three of the five safety-valve criteria—no violence or possession of a weapon during the offense, no death or serious bodily injury from the offense, and no aggravating role or participation in a CCE—and specifically stated that there was "no agreement as to [respondent's] criminal history or criminal history category." *Id.* at 30a. The agreement also stated that, "[a]bsent a determination by the Court that [respondent's] case satisfies the [safety-valve] criteria * * * , the statutory mandatory minimum sentence that the Court must impose * * * is ten years [of] imprisonment." *Id.* at 27a. If respondent had received all the sentencing reductions outlined in the agreement, including the safety-valve reduction, his Guidelines range, based on an offense level of 27 and a criminal history category of I, would have been 70 to 87 months of imprisonment. See Sentencing Guidelines Ch. 5, Pt. A.

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[4] A defendant is entitled to a two-level "safety valve" reduction under Sentencing Guidelines § 2D1.1(b)(6) if the criteria set forth in Section 5C1.2(a) are met. Section 5C1.2(a), in turn, provides that a defendant convicted of certain drug offenses, including conspiracy under 21 U.S.C. 846, is to be sentenced "in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5)." Those criteria are that (1) the defendant does not have more than one criminal history point; (2) the defendant did not use violence or threats of violence or possess a firearm or other dangerous weapon in connection with the offense; (3) the offense did not result in death or serious bodily injury; (4) the defendant did not occupy an organizational, leadership, managerial, or supervisory role in the offense and was not engaged in a continuing criminal enterprise (CCE); and (5) the defendant truthfully provided complete information concerning the offense before sentencing.

In the plea agreement, the parties acknowledged that the stipulations "do not bind * * * the Court," Pet. App. 30a, which is "not a party to th[e] agreement and need not accept any of the [government's] sentencing recommendations or the parties' stipulations," *id.* at 33a. Paragraph 19 of the agreement included an expanded statement of the advice that was then required by Fed. R. Crim. P. 11(e)(2) (1989): that "the defendant * * * has no right to withdraw the plea" if "the court does not accept the recommendation or request" for a particular sentence.[5] Paragraph 19 stated that, "[e]ven if the Court ignores any sentencing recommendation, finds facts or reaches conclusions different from any stipulation, and/or imposes any sentence up to the maximum established by statute," respondent "cannot, for that reason, withdraw [his] guilty plea, and [he] will remain bound to fulfill all [his] obligations under this agreement." Pet. App. 33a-34a.

The agreement was signed by respondent, a Spanish translator, respondent's counsel, and the prosecutor. Pet. App. 34a-36a. In signing the agreement, respondent acknowledged that it had been read to him in Spanish (the language he "understand[s] best"); that he had "carefully discussed every part of it with [his] attorney"; and that he "underst[oo]d" and "voluntarily agree[d]" to its terms. *Id.* at 35a. The signature of respondent's counsel was preceded by an acknowledgment that he had "carefully discussed every part of th[e] agreement with [respondent]." *Id.* at 36a.

5. On October 13, 1999, respondent appeared for a change-of-plea hearing, J.A. 55-80, at which the district

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[5] In the current version of Rule 11, this required advice is found in subsection (c)(3)(B). It is identical in substance to the provision in effect at the time of respondent's plea.

court conducted the colloquy required by Fed. R. Crim. P. 11. At the beginning of the proceeding, the court said that it was going to ask respondent a series of questions "to make certain that you understand all of your rights, what the penalties are that you face, and * * * that your plea agreement is not binding on the Court when it comes time for sentencing." J.A. 56-57.

A substantial portion of the Rule 11 colloquy was a review of the plea agreement, J.A. 61-75, which was filed and thereby made part of the record, J.A. 11.[6] Before reviewing the agreement, the court emphasized that it "is not a party to th[e] plea agreement" and that "at this time no one has promised [respondent] or figured out what [his] sentence should be." J.A. 61. The court then asked, "As you stand here now, has anybody promised you what the actual sentence will be in your case?" *Ibid.* Respondent answered "[n]o." *Ibid.* The district court then confirmed that the signature on the agreement was respondent's, that respondent had signed the agreement the day before, and that the acknowledgment preceding respondent's signature was still accurate. J.A. 62-63.

After addressing the nature of the charge to which respondent was pleading guilty, J.A. 63-64, the court turned to the section of the plea agreement that covered potential penalties, J.A. 64-65. During the ensuing portion of the colloquy, the following exchange took place:

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[6] The plea agreement executed on October 12, 1999, was amended before the change-of-plea hearing on October 13. See J.A. 71-75. The amended portions of the agreement have no relevance to the issues in this case. The plea agreement reproduced in the appendix to the petition for a writ of certiorari is the amended version.

THE COURT: In the next section of the plea agreement, there is a discussion about the penalties that you face.

You are reminded that absent a determination by the Court that your case satisfies the * * * safety valve exception, there is a mandatory minimum sentence that the Court must give you, which is ten years of imprisonment, followed by a five-year period of supervised release.

Do you understand the mandatory nature of the sentence the Court must impose as stated in paragraph 4 [of the agreement]?

THE DEFENDANT: Yes.

THE COURT: And at this point, has anyone promised you that you will in fact qualify for the so-called safety valve exception?

THE DEFENDANT: No.

THE COURT: So you realize the Court may give you a ten-year sentence or more, as provided for by law?

THE DEFENDANT: Yes.

THE COURT: Knowing that, do you still want to go forward with your guilty plea?

THE DEFENDANT: Yes.

J.A. 64. The court then confirmed that respondent's counsel had told respondent that his eligibility for the safety valve was "subject to the Court's determination." J.A. 65.

After addressing the factual basis for the plea, J.A. 65-67, and the constitutional rights that respondent was waiving by pleading guilty, J.A. 67-69, the district court turned to the section of the plea agreement that covered Sentencing Guidelines factors, J.A. 69-70. During the portion of the colloquy that followed, the court referred to the safety valve as a "possibility," J.A. 69, and asked respondent whether he understood that the "predictions" in the plea agreement were "not going to be binding on * * * the Court," *ibid.* Respondent answered "[y]es." *Ibid.* The court then noted that the parties had stipulated that three of the five safety-valve criteria were satisfied, *ibid.*, and again asked respondent whether he understood that "these stipulations are not binding on the Court," J.A. 70. Respondent said, "I do." *Ibid.*

Later in the hearing, the district court reminded respondent that paragraph 19 of the plea agreement outlined "the circumstances under which you may or may not be allowed to withdraw your guilty plea." J.A. 75. The court did not review that provision "word by word," however, *ibid.*, and made no further mention of the circumstances under which respondent would be able to withdraw his plea. In particular, the court did not comply with Rule 11(e)(2)'s requirement that the defendant be advised that he could not withdraw his plea if the court did not accept the parties' sentencing recommendations. Respondent did not object to the omission. See *ibid.*

At the conclusion of the hearing, the district court accepted respondent's guilty plea. J.A. 77. It found that respondent "understands the terms of the plea agreement which we have reviewed at some length," and that he "understands that the plea agreement is not binding upon the Court when it comes time for sentencing." *Ibid.* The court also found that respondent "understands each and all of his constitutional rights," that he "knowingly, intelligently, and voluntarily waived those rights," and that he "made his guilty plea freely and voluntarily." J.A. 79.

6. In the Presentence Report (PSR), the Probation Office concluded, contrary to the expectations of counsel, that respondent had three prior convictions and five criminal history points. PSR ¶¶ 70-92. The discrepancy between the Probation Office's conclusion and counsel's expectations was attributable to the fact that, when they negotiated the plea agreement, neither the prosecutor nor respondent's attorney was aware that respondent had two convictions under other names. J.A. 113-119. Because respondent had more than one criminal history point, he was not eligible for the safety valve. See Sentencing Guidelines § 5C1.2(a)(1). With an offense level of 29 and a criminal history category of III, respondent was subject to a Guidelines imprisonment range of 108 to 135 months. See *id.* Ch. 5, Pt. A. The statutory minimum prison term of 120 months, however, effectively became the low end of the applicable range. See *id.* § 5G1.1(c)(2).

When he received the PSR, and thereby learned that the Probation Office had calculated a sentence that exceeded the one contemplated by his plea agreement, respondent did not seek to withdraw his plea. See Fed. R. Crim. P. 32(e) (1996). Instead, he made a written sentencing submission in which he stated that he had "no material objections" to the PSR and agreed with the Probation Office's "recommendation that he be sentenced to the mandatory-minimum term of 120 months." J.A. 81-82.

On March 13, 2000, respondent appeared for sentencing. J.A. 104-122. At the sentencing hearing,

respondent complained about his attorney's representation, J.A. 109-114, but he did not express any desire to withdraw his plea and go to trial. Instead, respondent repeatedly stated that he accepted responsibility for his criminal conduct. J.A. 109-112. After ruling that it would not appoint new counsel, J.A. 112, 119, the district court sentenced respondent to 120 months of imprisonment, J.A. 119-121, 123-127.

7. On appeal, respondent contended that the district court had abused its discretion in denying his request for substitute counsel and that his attorney had provided ineffective assistance. Resp. C.A. Br. 21-37. He also claimed, for the first time, that the district court had violated Rule 11(e)(2) by failing to advise him at his change-of-plea hearing that he could not withdraw his plea if the parties' sentencing recommendations were rejected. *Id.* at 17-21. The government conceded that the court had not complied with Rule 11(e)(2), Gov't C.A. Br. 17, and acknowledged that, under then-existing Ninth Circuit precedent, the error was subject to harmless-error review under Fed. R. Crim. P. 11(h), *ibid.*[7] Noting this Court's recent grant of certiorari in *United States* v. *Vonn*, 531 U.S. 1189 (2001), the government took the position that plain-error review under Rule 52(b) (rather than harmless-error review

[7] At the time of appeal, Rule 11(h) provided that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." Subsection (h) was added to Rule 11 to "make[] clear that the harmless error rule of Rule 52(a) is applicable to Rule 11." Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments), 18 U.S.C. App. at 1568. At the time of appeal, Rule 52(a) provided that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The current versions of Rules 11(h) and 52(a) are identical in substance to the earlier versions.

under Rule 11(h)) should apply to forfeited claims of Rule 11 error, Gov't C.A. Br. 17 n.2, but argued that respondent was not entitled to relief even under the harmless-error standard, *id.* at 18-21.

On January 29, 2002, the court of appeals issued an unpublished decision in which it affirmed the denial of respondent's motion for substitute counsel and declined to address his ineffective-assistance claim, but agreed that the district court had violated Rule 11(e)(2) and held that the error was not harmless. Pet. App. 21a-23a. Although it concluded that respondent's guilty plea should be vacated and the case remanded to permit respondent to enter a new plea, *id.* at 22a, the court, on its own motion, stayed issuance of its mandate pending the decision in *Vonn*, *id.* at 21a.

On March 4, 2002, this Court issued its decision in *Vonn*, 535 U.S. 55, which included two holdings. The first was that forfeited claims of Rule 11 error are reviewed under the plain-error standard of Rule 52(b), rather than the harmless-error standard of Rule 11(h). *Id.* at 62-74. The second was that, in determining whether a district court's violation of Rule 11 is reversible error, a reviewing court is not limited to the plea transcript, but may consider other portions of the record (in that case, transcripts of two earlier proceedings). *Id.* at 74-76. The court of appeals subsequently withdrew its decision and directed the parties to file supplemental briefs addressing the effect of *Vonn*. See Gov't Supp. C.A. Br. 1.

8. On November 25, 2002, the court of appeals, this time by a divided vote, again vacated respondent's

conviction based on the Rule 11 violation and remanded for further proceedings.[8]

a. Applying the plain-error standard mandated by *Vonn*, Pet. App. 4a-5a, the majority determined that the district court's failure to comply with Rule 11(e)(2) was an "error" that was "plain," *id.* at 5a. Citing *United States* v. *Minore*, 292 F.3d 1109 (9th Cir. 2002), cert. denied, 537 U.S. 1146 (2003), the majority then held that a plain error affects "substantial rights" if the defendant shows that "the court's error was not minor or technical" and that "he did not understand the rights at issue when he entered his guilty plea." Pet. App. 5a. The majority found that respondent had made both showings. It concluded that the error was not "minor or technical" because respondent's sentence "was substantially higher than the one for which [he] bargained." *Id.* at 6a. And it concluded that respondent did not understand his right to withdraw his plea despite paragraph 19 of the plea agreement. Quoting *United States* v. *Kennell*, 15 F.3d 134, 136 (9th Cir. 1994), the majority relied on what that decision had characterized as the "marked difference" between "being warned in open court by a district judge" and "reading some boiler-plate language during the frequently hurried and hectic moments before court is opened for the taking of [the] plea," and held that "the reading of [a] plea agreement is not a substitute for rigid observance of Rule 11." Pet. App. 6a. The majority deemed "unpersuasive" the government's argument that *Vonn* had undermined *Kennell*, reasoning that,

[8] In a contemporaneous unpublished decision, the court of appeals unanimously reinstated, verbatim, that portion of its prior unpublished decision that addressed respondent's substitution and ineffective-assistance claims. Pet. App. 19a-20a.

although *Vonn* authorizes appellate courts to consider warnings given to the defendant at an earlier stage of the case, it does not address the issue of plea agreements. *Id.* at 7a.[9] The majority then concluded that it would exercise its discretion to remedy the Rule 11 error, in order to prevent the "miscarriage of justice" that would result if respondent were required to serve a sentence that exceeded the one he expected. *Id.* at 10a.

b. Judge Tallman dissented. Pet. App. 10a-18a. In his view, the "cumulative effect of [respondent's] signed plea agreement *and* the questions posed to [him] during the plea colloquy," *id.* at 11a, conclusively demonstrated that he "understood the binding nature of his guilty plea," *id.* at 12a, and thus that "no plain error attends his conviction and sentence," *id.* at 11a. The dissent criticized the majority for "elevat[ing] form over substance by looking only to see if the 'magic words' were spoken in the colloquy, while the Supreme Court tells us to apply the plain error rule to the record as a whole." *Id.* at 12a.

SUMMARY OF ARGUMENT

A defendant who raises a claim of Rule 11 error for the first time on appeal, but cannot show that he would have persisted in a plea of not guilty if he had received the advice omitted by the district court, cannot demonstrate reversible plain error.

I. Under the plain-error rule, a defendant cannot overturn a guilty plea based on a violation of Rule 11

[9] The majority also rejected the government's argument that, because the district court had informed respondent that it was not bound by the government's sentencing recommendation, he could not establish a lack of understanding that he could not withdraw his plea. Pet. App. 8a.

unless he can establish that the error had an effect on substantial rights. This Court's decisions make clear that, in both the harmless-error and the plain-error context, an error affects substantial rights if it was "prejudicial," which means that it "affected the outcome" of the district court proceeding in question. *United States* v. *Olano*, 507 U.S. 725, 734 (1993). Accordingly, as nine courts of appeals have held, a violation of Fed. R. Crim. P. 11 has no effect on substantial rights unless it affected the defendant's decision to plead guilty.

The Ninth Circuit has departed from that approach and holds that a Rule 11 error affects substantial rights if it was not "minor or technical" and the defendant did not understand the right at issue at the time of his plea. That standard is unsound. The Ninth Circuit derived the first part of its standard from a statement in an advisory committee note that a guilty plea should not be overturned "when there has been a minor and technical violation of Rule 11 which amounts to harmless error." Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments), 18 U.S.C. App. at 1569. The same note states, however, that the meaning of "harmless error" is "left to the case law," *id.* at 1568, and the case law makes clear that an error does not affect substantial rights unless it affected the outcome of the proceeding. As for the second part of the Ninth Circuit's standard, while a defendant's awareness of the omitted advice is ordinarily a sufficient basis for finding that a Rule 11 error did not affect substantial rights, it is not necessary. A court may be able to conclude that the defendant would have pleaded guilty even if he was not otherwise aware of the omitted advice when, for example, the defendant never claimed that he would have gone to trial if the advice had been given, the

defendant made affirmative statements indicating that he was intent on pleading guilty, the defendant received a significantly reduced sentence in exchange for his plea, or the evidence was so strong that there is little likelihood that the defendant would have risked a guilty verdict at trial.

The Eleventh Circuit holds that a violation of Rule 11 that involves a failure to address one of the rule's three "core" concerns necessarily affects substantial rights. That approach is also unsound. The Eleventh Circuit's standard is based on the rule of automatic reversal established in *McCarthy* v. *United States*, 394 U.S. 459 (1969), but that rule was rejected in 1983 through the enactment of Fed. R. Crim. P. 11(h), which subjects all preserved claims of Rule 11 error to harmless-error review. Nor does a failure to comply with Rule 11 fall within the limited class of "structural" errors that can be corrected regardless of their effect on the outcome.

Even if a defendant can demonstrate that a Rule 11 error affected his substantial rights despite the fact that it did not affect his decision to plead guilty, such a defendant cannot show that the error satisfies the fourth requirement of the plain-error rule: that it had a serious effect on the fairness, integrity, or public reputation of judicial proceedings. This Court has held that the failure to charge an element of the offense in the indictment or submit it to the jury does not satisfy the fourth component of the plain-error rule when the evidence leaves no doubt about what the outcome of the grand jury proceeding or the trial would have been if the error had not occurred. See *United States* v. *Cotton*, 535 U.S. 625, 633-634 (2002) (grand jury); *Johnson* v. *United States*, 520 U.S. 461, 470 (1997) (trial). There is at least as much reason to apply that principle to Rule 11 errors, because society's interest in

finality has "special force" when a conviction is based on a guilty plea. *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979). Under the fourth requirement of plain-error review, a defendant should therefore not be entitled to overturn his guilty plea based on Rule 11 error when he would have entered the same plea even absent the error.

II. Respondent cannot demonstrate that he would have persisted in his plea of not guilty if the district court had advised him during the plea colloquy that he could not withdraw his guilty plea if the government's sentencing recommendation was rejected. Respondent has never alleged that he would have gone to trial if the omitted advice had been given. Indeed, statements that he made to the district court demonstrate the opposite. Moreover, even without the safety valve, respondent received a substantial reduction in his sentence by pleading guilty, and the overwhelming evidence of his guilt made the chances of acquittal low. Finally, although the district court did not advise respondent that he was bound by his plea if the court did not accept the parties' sentencing recommendation, it did advise him that it was not required to accept that recommendation. For all of those reasons, respondent cannot show that, but for the violation of Rule 11, he would have adhered to a not-guilty plea. The Rule 11 error, therefore, neither affected substantial rights nor seriously affected the fairness, integrity, or public reputation of judicial proceedings.

ARGUMENT

RESPONDENT CANNOT SHOW REVERSIBLE PLAIN ERROR BECAUSE THE RULE 11 ERROR AT THE GUILTY PLEA COLLOQUY HAD NO EFFECT ON HIS DECISION TO PLEAD GUILTY

I. A VIOLATION OF RULE 11 DOES NOT CONSTITUTE REVERSIBLE PLAIN ERROR UNLESS THE DEFENDANT CAN ESTABLISH THAT HE WOULD HAVE PERSISTED IN HIS PLEA OF NOT GUILTY IF HE HAD BEEN GIVEN THE OMITTED RULE 11 ADVICE

Rule 52(b) of the Federal Rules of Criminal Procedure provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Under this rule, a court of appeals is required to reject a forfeited claim unless the defendant makes four separate showings. As this Court has explained:

> [B]efore an appellate court can correct an error not raised at trial, there must be (1) "error," (2) that is "plain," and (3) that "affect[s] substantial rights." If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."

Johnson v. *United States*, 520 U.S. 461, 466-467 (1997) (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)) (citations and internal quotation marks omitted). As explained below, a defendant who raises a claim of Rule 11 error for the first time on appeal, but cannot show that he would have persisted in his plea of not guilty if he had received the advice omitted by the district court, cannot satisfy either the third or the

fourth requirement of the plain-error rule, and thus is not entitled to vacatur of his guilty plea.

A. A Defendant Who Cannot Show That He Would Have Persisted In His Plea Of Not Guilty If He Had Been Given The Omitted Advice Cannot Demonstrate That A Rule 11 Error Affected His Substantial Rights

1. This Court's decisions establish that an error affects substantial rights if it affected the outcome of the district court proceeding

In *United States* v. *Olano*, this Court held that an effect on substantial rights under the plain-error rule (Fed. R. Crim. P. 52(b)) has the same meaning that it has under the harmless-error rule (Fed. R. Crim. P. 52(a)). 507 U.S. at 734.[10] It ordinarily means that the error "must have been prejudicial," which in turn means that it "must have affected the outcome of the district court proceedings." *Ibid.* Accord, *e.g.*, *United States* v. *Cotton*, 535 U.S. 625, 632 (2002). An error will be found to have had *no* effect on a defendant's substantial rights, therefore, if the outcome of the proceeding "would have been the same" if the error had not occurred. *Jones* v. *United States*, 527 U.S. 373, 402 (1999); *Neder* v. *United States*, 527 U.S. 1, 17 (1999).

The Court has applied that principle to various types of judicial proceedings, in both plain-error and harmless-error cases. Thus, an error in a grand jury

[10] Insofar as the "substantial rights" component is concerned, the only difference between the plain-error rule and the harmless-error rule is that the former requires the defendant to prove that the error had an effect on substantial rights while the latter requires the government to prove that the error did not have an effect on substantial rights. See *Vonn*, 535 U.S. at 62-63; *Olano*, 507 U.S. at 734.

proceeding is not prejudicial unless it "had an effect on the grand jury's decision to indict," *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 263 (1988); an error at a detention hearing is not prejudicial unless it had an effect on the court's decision to order the defendant detained, see *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 722 (1990); an error at trial is not prejudicial unless it "influenced the verdict," *Olano*, 507 U.S. at 740; accord, *e.g.*, *Neder*, 527 U.S. at 17 (trial error is not prejudicial if "the jury verdict would have been the same absent the error"); and an error at sentencing is not prejudicial unless it affected the sentence imposed, see *Jones*, 527 U.S. at 394-395; see also *Williams* v. *United States*, 503 U.S. 193, 203 (1992) (sentencing error is not prejudicial if "the error did not affect the district court's selection of the sentence"). The same principle applies when the judicial proceeding is a hearing at which a defendant enters a guilty plea. When a defendant seeks to have his guilty plea vacated on the basis of a Rule 11 error, the error is not prejudicial, and thus does not affect substantial rights, unless it affected the defendant's decision to plead guilty.

While this Court has not previously had the opportunity to apply *Olano*'s standard to guilty pleas, there is nothing in either the holding or the logic of the decision to suggest that a plea proceeding should constitute an exception from the "district court proceedings," 507 U.S. at 734, whose outcome must have been affected for an error to have an effect on substantial rights. Indeed, in a different context, this Court has explicitly held that a violation of a defendant's rights in connection with a guilty plea does not result in "prejudice" unless it affected his decision to plead guilty. In *Hill* v. *Lockhart*, 474 U.S. 52 (1985), the

Court addressed the question whether a deficiency in the performance of counsel in advising the defendant to enter a guilty plea was sufficiently prejudicial to qualify as ineffective assistance of counsel under the test set forth in *Strickland* v. *Washington*, 466 U.S. 668 (1984). Under the "prejudice" component of that test, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, "the result of the proceeding would have been different." 466 U.S. at 694. Applying *Strickland* in *Hill*, the Court held that the relevant inquiry is whether, but for counsel's errors, the defendant "would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59.

2. The standards applied by the Ninth Circuit and the Eleventh Circuit are inconsistent with this Court's decisions

Consistent with the principle that an error affects substantial rights if it "affect[s] the outcome of the district court proceedings," *Olano*, 507 U.S. at 734, nine of the eleven circuits to consider the question have concluded that a Rule 11 error affects substantial rights if the defendant would have persisted in a plea of not guilty had the error not occurred.[11] Only the Ninth

[11] See, *e.g.*, *United States* v. *Lyons*, 53 F.3d 1321, 1322 (D.C. Cir. 1995); *United States* v. *Noriega-Millán*, 110 F.3d 162, 167 (1st Cir. 1997); *United States* v. *Westcott*, 159 F.3d 107, 112-113 (2d Cir. 1998), cert. denied, 525 U.S. 1084 (1999); *United States* v. *Dixon*, 308 F.3d 229, 234 (3d Cir. 2002); *United States* v. *Martinez*, 277 F.3d 517, 532 (4th Cir.), cert. denied, 537 U.S. 899 (2002); *United States* v. *Johnson*, 1 F.3d 296, 302 (5th Cir. 1993) (en banc); *United States* v. *Martinez*, 289 F.3d 1023, 1029 (7th Cir. 2002); *United States* v. *Prado*, 204 F.3d 843, 846 (8th Cir.), cert. denied, 531 U.S. 1042 (2000); *United States* v. *Vaughn*, 7 F.3d 1533, 1535 (10th Cir. 1993), cert. denied, 511 U.S. 1036 (1994). While some of these

Circuit and the Eleventh Circuit apply a different standard. The standard in the Ninth Circuit, which it applied in this case (Pet. App. 5a), is that "a defendant's substantial rights are affected by Rule 11 error where the defendant proves that the court's error was not minor or technical and that he did not understand the rights at issue when he entered his guilty plea." *Minore*, 292 F.3d at 1118. In the Eleventh Circuit, there is a *per se* rule that a violation of Rule 11 affects substantial rights, and requires reversal, if it involves a failure to address one of the rule's three "core" concerns or objectives: ensuring that the guilty plea "is free of coercion"; ensuring that the defendant "understands the nature of the charges against him"; and ensuring that the defendant "is aware of the direct consequences of the guilty plea." *United States* v. *Quinones*, 97 F.3d 473, 475 (11th Cir. 1996).[12] As explained below, the Ninth Circuit and Eleventh Circuit standards are erroneous.

a. The Ninth Circuit's standard is erroneous

In *Minore*, 292 F.3d at 1118-1119, the Ninth Circuit "borrow[ed]" the interpretation of the effect-on-substantial-rights component of the plain-error rule from a pre-*Olano* Ninth Circuit case, *United States* v.

decisions applied the plain-error rule, others applied the harmless-error rule.

[12] A number of Rule 11's requirements, including the one at issue here, have been found to address a "core" concern. See *United States* v. *Zickert*, 955 F.2d 665, 667-669 (11th Cir. 1992). When a Rule 11 error does not implicate a "core" concern, the Eleventh Circuit applies the majority rule: it reverses only if the defendant "would not have pled guilty had he been * * * fully apprised of his * * * right[s]." *United States* v. *Monroe*, No. 02-12918, 2003 WL 23005180, at *8 (11th Cir. Dec. 24, 2003).

Graibe, 946 F.2d 1428 (1991), that had reviewed a claim of Rule 11 error under the harmless-error rule. *Graibe* held that, under Rule 11(h), an error is harmless if (1) the error was "minor or technical" or (2) the defendant was aware of the omitted information when he entered his plea. 946 F.2d at 1433-1434.

Graibe, in turn, borrowed the "minor or technical" half of its standard from the advisory committee note accompanying Rule 11(h). See 946 F.2d at 1433. The language in the note on which the Ninth Circuit relied was that a guilty plea "should not be overturned * * * when there has been a minor and technical violation of Rule 11 which amounts to harmless error." Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments), 18 U.S.C. App. at 1569. But that language reflects only a recognition that a "minor and technical" violation of Rule 11 can be harmless error. It does not purport to define "harmless error" in general or an "effect on substantial rights" in particular. Indeed, the second sentence of the same advisory committee note explicitly states that Rule 11(h) "does not * * * attempt to define the meaning of 'harmless error,' which is left to the case law." *Id.* at 1568. The case law—in particular, this Court's decision in *Olano*—makes clear that, in both the harmless-error and the plain-error context, an effect on substantial rights means that the error "affected the outcome of the district court proceedings." 507 U.S. at 734. The advisory committee note in fact supports this view, since it cites with approval decisions that applied the harmless-error rule when the Rule 11 violation "could not have had any impact on the defendant's decision to plead." Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments), 18 U.S.C. App. at 1568.

The other half of the Ninth Circuit's standard—that a Rule 11 error has no effect on substantial rights if the defendant was aware of the information omitted by the district court—is likewise inconsistent with the standard set forth in *Olano*, because it is too narrow. If the defendant was otherwise aware of the omitted information—because, for example, as in *Vonn*, he received the information at an earlier stage of the case—but nonetheless pleaded guilty, it will usually follow that the district court's failure to provide him with the same information during the plea colloquy did not affect his decision to plead guilty. Indeed, one of the advisory committee note's examples of a case in which a Rule 11 error is likely to be harmless is one in which "the judge's compliance with [Fed. R. Crim. P. 11(c)(1)(1983)] was not absolutely complete, in that some essential element of the crime was not mentioned, but the defendant's responses clearly indicate his awareness of that element." Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments), 18 U.S.C. App. at 1569 (citing *United States* v. *Coronado*, 554 F.2d 166 (5th Cir.), cert. denied, 434 U.S. 870 (1977)). Cf. *Peguero* v. *United States*, 526 U.S. 23 (1999) (defendant not prejudiced by district court's failure to comply with requirement of Fed. R. Crim. P. 32 that he be advised of right to appeal sentence, because defendant was aware of right).

But while awareness of the omitted advice is ordinarily a sufficient basis for finding that a Rule 11 error did not affect substantial rights, it is not necessary. As the courts of appeals have recognized, there are a variety of circumstances that, either alone or in combination, could lead a court to conclude that the defendant was determined enough to plead guilty that he would have done so despite not being otherwise

aware of the information omitted from the Rule 11 colloquy. One such circumstance is where, after becoming aware of the omitted Rule 11 information, the defendant did not seek to withdraw his plea on the ground that he would not have pleaded guilty if he had been aware of it before,[13] or where the defendant does not otherwise allege that that is so.[14] A second such circumstance is where the defendant made affirmative statements indicating that he was intent on pleading guilty.[15] A third is where the defendant received a

[13] See, *e.g.*, *Westcott*, 159 F.3d at 112 (if defendant "had been misled by the plea allocution, once he learned the [correct information] he surely would have asked the district court to permit him to withdraw his plea"); *Vaughn*, 7 F.3d at 1536 (because defendant "did not move to withdraw his plea at any time," he "fails to show that he would not have pled guilty if he had received the proper rule 11 warning"). A defendant may withdraw a guilty plea after the plea is accepted but before sentence is imposed if he can show "a fair and just reason" for the withdrawal. Fed. R. Crim. P. 11(d)(2)(B).

[14] See, *e.g.*, *Dixon*, 308 F.3d 235 (defendant "never clearly and unmistakably asserted that had he been correctly informed of the [omitted advice], he *would*, in fact, have pled not guilty and gone to trial"); *Vaughn*, 7 F.3d at 1536 (defendant "does not allege that he would not have entered a guilty plea if the court had given the proper warning"); *United States* v. *Thibodeaux*, 811 F.2d 847, 848 (5th Cir.) (defendant does not "allege that he would have withdrawn his plea had the district judge given the Rule 11(e)(2) warning"), cert. denied, 483 U.S. 1008 (1987).

[15] See, *e.g.*, *United States* v. *Cannady*, 283 F.3d 641, 648 (4th Cir.) (defendant's statements to district court demonstrated that defendant "did not want to go to trial under any circumstances"), cert. denied, 537 U.S. 936 (2002); *United States* v. *Coscarelli*, 105 F.3d 984, 996-997 (5th Cir.) (Jones, J., dissenting) (defendant's statement at sentencing demonstrated that he "had no intention of going to trial or asserting his innocence"), vacated, 111 F.3d 376 (5th Cir. 1997).

significantly reduced sentence in exchange for his plea.[16] And a fourth is where the evidence was so strong that the defendant is not likely to have taken the chance of being found guilty at trial and facing any lengthier sentence.[17] This list is meant to be illustrative, not exhaustive.[18]

[16] See, *e.g.*, *Dixon*, 308 F.3d at 235 (government agreed that defendant's offense level would be reduced and that no additional charges would be brought); *Cannady*, 283 F.3d at 648-649 (government "dropped three charges carrying substantial penalties" and "stipulated to drug quantities"); *United States* v. *General*, 278 F.3d 389, 395 (4th Cir.) (government "dropped an additional firearm charge, which would have carried a mandatory 25-year consecutive sentence"), cert. denied, 536 U.S. 950 (2002); *Martinez*, 277 F.3d at 532-533 (plea "reduced [the defendant's] potential exposure to prison by sixty years, reduced his financial exposure by $1.5 million, and required the Government to recommend that the court decrease his prison sentence").

[17] See, *e.g.*, *United States* v. *Kelly*, 337 F.3d 897, 905 (7th Cir. 2003) (in light of "overwhelming evidence of his guilt," defendant cannot show that correct Rule 11 advice would have "altered his decision-making calculus"); *United States* v. *Molina-Uribe*, 853 F.2d 1193, 1199 (5th Cir. 1988) (defendant's "knowledge that he would face overwhelming evidence of guilt in a trial * * * may well have motivated him to plead guilty in the hope of receiving consideration for having admitted his guilt"), cert. denied, 489 U.S. 1022 (1989).

[18] As Judge Boudin has observed, in some cases in which the omitted Rule 11 advice is related to sentencing, the question whether "the ultimate outcome [of the plea proceeding] would have been the same if the error had not been committed" is "not necessarily the proper [one]" to ask when reviewing the error under a harmless-error or plain-error standard. *United States* v. *Raineri*, 42 F.3d 36, 41-42 (1st Cir. 1994), cert. denied, 515 U.S. 1126 (1995). Even if the defendant in such a case "might not have pled guilty" if he had been provided with the omitted advice, the guilty plea should stand if "the actual punishment is no worse than what he was told." *Id.* at 42. For example, courts have held that a

b. The Eleventh Circuit's standard is erroneous

The Eleventh Circuit's "core concern" approach to Rule 11 error is derived from a 1979 Fifth Circuit decision, *United States* v. *Dayton*, 604 F.2d 931 (en banc), cert. denied, 445 U.S. 904 (1980). See, *e.g.*, *United States* v. *Bell*, 776 F.2d 965, 968 (11th Cir. 1985) (citing *Dayton*), cert. denied, 477 U.S. 904 (1986). *Dayton*, in turn, relied on *McCarthy* v. *United States*, 394 U.S. 459 (1969), a case decided by this Court at a time when Rule 11 was "relatively primitive." *Vonn*, 535 U.S. at 66. At that time, Rule 11 "consisted of but four sentences," Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments), 18 U.S.C. App. at 1568, and required

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district court's understatement of the maximum sentence, see Fed. R. Crim. P. 11(b)(1)(H), does not affect substantial rights when the sentence imposed is below the maximum erroneously identified during the plea proceeding. See Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments), 18 U.S.C. App. at 1568 (citing *United States* v. *Peters*, No. 77-1700 (4th Cir. Dec. 22, 1978)); *Raineri*, 42 F.3d at 42 (citing cases). Courts have similarly held that misinforming a defendant about supervised release, see Fed. R. Crim. P. 11(b)(1)(H), (I), does not affect substantial rights when the combined terms of imprisonment and supervised release that are imposed are below the maximum prison term of which he was advised. See *United States* v. *Bejarano*, 249 F.3d 1304, 1306-1307 n.1 (11th Cir. 2001) (citing cases). And courts have held that a district court's failure to make the defendant aware of its authority to order restitution, see Fed. R. Crim. P. 11(b)(1)(K), does not affect substantial rights if the amount of restitution ordered is less than the potential fine of which he was advised. See *United States* v. *Morris*, 286 F.3d 1291, 1293-1295 & n.2 (11th Cir. 2002) (citing cases). It has also been held that a district court's failure to advise the defendant that he could not withdraw his plea if the court did not accept the parties' sentencing recommendation is harmless error if the court did in fact accept the recommendation. *United States* v. *Chan*, 97 F.3d 1582, 1583-1584 (9th Cir. 1996).

only that a district court "determin[e] that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea" and that the court "satisf[y] [itself] that there is a factual basis for the plea," Fed. R. Crim. P. 11 (1966). As the Fifth Circuit observed in *Dayton*, *McCarthy* held that "'prejudice inheres' in failure to comply with Rule 11 in its form at the time of that opinion," and "all the rule then treated" were "absence of coercion, understanding of the accusation, and knowledge of the direct consequences of the plea." 604 F.2d at 939 (quoting 394 U.S. at 471). *Dayton* therefore held that "a failure by the trial court to address any one or more of the rule's three core concerns as occurred in *McCarthy* requires automatic reversal," while other violations of Rule 11, which had been expanded since *McCarthy* was decided, do not. *Id.* at 939-940.[19]

Dayton antedated the enactment of Rule 11(h), which was added in 1983 to "make[] clear that the harmless error rule of Rule 52(a) is applicable to Rule 11" and to "reject[]" the "*McCarthy* per se rule" of "automatic reversal" for Rule 11 errors. Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments), 18 U.S.C. App. at 1568-1569. Automatic reversal was found to be "no longer" justified because (among other reasons) Rule 11 was "much simpler" when *McCarthy* was decided. *Id.* at 1569. By its terms, Rule 11(h) applies to any Rule 11 violation; unlike *Dayton*, it does not "distin-

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[19] By the time *Dayton* was decided, Rule 11 had assumed a form much like that of the current version. See *Vonn*, 535 U.S. at 69 (noting that Rule 11 was transformed into "detailed formula" in 1975). The version then in effect had seven subsections, two of which had multiple paragraphs, and it required district courts to provide a defendant with detailed advice before accepting a plea. See Fed. R. Crim. P. 11 (1979).

guish between *McCarthy*-type errors and others." 604 F.2d at 939. Recognizing that *Dayton* has been "supplanted by the 1983 addition of section (h) to Rule 11," the en banc Fifth Circuit repudiated that decision in 1993, and held that "no failure in the plea colloquy—* * * core or non-core—will mandate an automatic reversal of a conviction." *Johnson*, 1 F.3d at 298, 301. By adhering to *Dayton*'s rule of automatic reversal for certain categories of Rule 11 error, the Eleventh Circuit has overlooked the effect of Rule 11(h).

Since Rule 11 itself does not mandate automatic reversal for any type of violation, and since the meaning of an "effect on substantial rights" is "left to the case law," Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments), 18 U.S.C. App. at 1568, automatic reversal for Rule 11 errors that implicate a "core" concern can be justified only if such errors fall within "the 'limited class' of 'structural errors' that 'can be corrected regardless of their effect on the outcome.'" *Cotton*, 535 U.S. at 632 (quoting *Johnson*, 520 U.S. at 468-469, and *Olano*, 507 U.S. at 735)) (citations omitted). They do not fall within that limited class.

"Structural" errors are "fundamental constitutional errors" that "defy harmless-error review" because, instead of being simply "error[s] in the trial process itself," they "affect[] the framework within which the trial proceeds" and thus "infect the entire * * * process." *Neder*, 527 U.S. at 7-8 (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991), and *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993)). Rather than being "constitutionally mandated," the colloquy required by Rule 11 is intended to assist the district court in making "the constitutionally required determination" that the defendant's guilty plea is "truly voluntary." *McCarthy*, 394 U.S. at 465. Accord *Halliday* v. *United States*, 394 U.S. 831, 833 (1969) (per curiam) ("[A] large number of constitutionally valid convictions * * * may have been obtained without full compliance with Rule 11."). Since Rule 11 procedures are not of constitutional dimension, a "formal violation" of the rule is not a constitutional error, *United States* v. *Timmreck*, 441 U.S. 780, 783 (1979), and *a fortiori* is not a "fundamental constitutional error[]," *Neder*, 527 U.S. at 7. Nor can a violation of one of the requirements of Rule 11 be said to "infect the entire [guilty plea] process." *Id.* at 8 (quoting *Brecht*, 507 U.S. at 630). Instead, such an error is "simply an error in the * * * process itself." *Ibid.* (quoting *Fulminante*, 499 U.S. at 310). For that reason, a district court's failure to provide a particular piece of advice required by Rule 11 is far removed from the small category of errors that have been held to be "structural." See *ibid.* (complete denial of counsel, biased trial judge, racial discrimination in selection of grand jury, denial of self-representation at trial, denial of public trial, defective reasonable-doubt instruction).

B. A Defendant Who Cannot Show That He Would Have Persisted In His Plea Of Not Guilty If He Had Been Given The Omitted Advice Cannot Demonstrate That A Rule 11 Error Seriously Affected The Fairness, Integrity, Or Public Reputation Of Judicial Proceedings

Even if the Ninth Circuit's narrow understanding of the third component of the plain-error rule were correct, the fourth component of the rule would preclude vacatur of a guilty plea when a Rule 11 violation had no effect on the outcome of the proceedings. In that circumstance, on the assumption that a plain Rule 11 error affected the defendant's substantial rights because the defendant was not aware of the omitted advice and the

error was not minor or technical, it would still be an abuse of discretion for the court of appeals to notice the error, because the error would not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)).

In *Johnson* v. *United States* and *United States* v. *Cotton*, the Court assumed, without deciding, that the failure to charge an element of the offense in the indictment (*Cotton*) or submit it to the jury (*Johnson*) satisfied the third requirement of the plain-error rule, but concluded that the error did not satisfy the fourth requirement, because the evidence supporting the omitted element was "overwhelming" and "essentially uncontroverted." *Cotton*, 535 U.S. at 633; *Johnson*, 520 U.S. at 470. The Court held that the omission did not seriously affect the fairness, integrity, or public reputation of the grand jury proceeding (*Cotton*) or trial (*Johnson*) because the evidence left no doubt about what the outcome of the proceeding would have been if there had been no error. See *Cotton*, 535 U.S. at 633-634 (grand jury "would have * * * found" omitted element, just as petit jury would have done in *Johnson*). The justification for applying that principle in this case may be even more compelling than in *Johnson* and *Cotton*, because "the concern with finality" has "special force with respect to convictions based on guilty pleas." *Timmreck*, 441 U.S. at 784.

The prosecution focuses considerable energy on preparing to prove its charges in the district court, and a guilty plea means that those preparations are no longer necessary. Victims and witnesses rely on the finality of the disposition, and the court system moves on to other business. A rule of procedure that freely allowed a defendant to escape his plea, long after its entry,

without having raised a claim of a Rule 11 violation in the district court, and without even claiming actual innocence of the charge, would not serve to vindicate the integrity, fairness, or public reputation of judicial proceedings. Indeed, such a rule would undermine those values, by potentially requiring the adjudication of criminal charges after memories have faded and witnesses have become unavailable.

Accordingly, the discretionary component of the plain-error rule should preclude reversal if a defendant acted knowingly and voluntarily in pleading guilty and the specific advice that the district court failed to provide would have been immaterial to the defendant's decision to plead. In those circumstances, there is no basis to conclude that a "miscarriage of justice" would result, *Olano*, 507 U.S. at 736 (quoting *United States* v. *Young*, 470 U.S. 1, 15 (1985)), if the defendant is not allowed to withdraw his plea. Indeed, in *United States* v. *Timmreck*, which holds that a claim of a formal violation of Rule 11 is not cognizable in a collateral proceeding under 28 U.S.C. 2255, see 441 U.S. at 783-785, this Court explicitly found that such an error cannot have resulted in a "complete miscarriage of justice" when the defendant did not contend that, "if he had been properly advised by the trial judge, he would not have pleaded guilty," *id.* at 784.

As the Court observed in *Johnson*, "[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." 520 U.S. at 470 (quoting Roger Traynor, *The Riddle of Harmless Error* 50 (1970)). A rule that would allow a defendant to enter a solemn plea of guilty knowingly and voluntarily and without raising any objections, and then, after sentence and entry of judgment, escape the effect of his plea because

of an error that is immaterial to his decision to plead guilty, would elevate minor flaws over substantial justice. That is not a rule that would command public confidence.

II. RESPONDENT CANNOT ESTABLISH THAT HE WOULD HAVE PERSISTED IN HIS PLEA OF NOT GUILTY IF HE HAD BEEN GIVEN THE OMITTED RULE 11 ADVICE

The district court failed to advise respondent that, if his prison term exceeded the one contemplated by his plea agreement, he could not withdraw his plea. This was a violation of an express requirement of Rule 11, and thus was an error that is plain. Because respondent did not object in the district court, it is his burden, as *Vonn* holds, to demonstrate that the plain error affected his substantial rights and seriously affected the fairness, integrity, or public reputation of the proceedings. See 535 U.S. at 62-63. Respondent cannot make either showing, because, on this record, he cannot demonstrate that, if he had been given the omitted advice during the Rule 11 colloquy, he would have changed his mind about pleading guilty, terminated the change-of-plea hearing, and proceeded to trial.

In its petition for a writ of certiorari, the government asked the Court to decide whether a court of appeals may consider the terms of a written plea agreement in determining whether a Rule 11 violation constitutes reversible plain error. Pet. i (Question Two). The government argued (Pet. 23-26) that the Ninth Circuit's refusal to consider a plea agreement is inconsistent with *Vonn*'s holding that a court addressing a claim of Rule 11 error may look to "the entire record." 535 U.S. at 59. This Court's grant of certiorari, however, 124 S. Ct. 921 (2003), was limited to the question addressed

in this brief: whether, in order to show that a violation of Rule 11 constitutes reversible plain error, a defendant must demonstrate that he would not have pleaded guilty if the violation had not occurred. Pet. i (Question One). Because it denied certiorari on the former question, the Court might choose to assume, for purposes of deciding this case, that the Ninth Circuit's rule against considering plea agreements is correct. Even if his plea agreement is disregarded, however, respondent cannot demonstrate that he would have persisted in his plea of not guilty if the omitted Rule 11 advice had been given.[20]

First, as the Second Circuit has observed, if a defendant had truly been "misled into pleading guilty by the court's statement at the plea hearing," it stands to reason that, upon learning of the mistake, "he would have sought in the district court to withdraw his guilty plea and proceed to trial." *Westcott*, 159 F.3d at 113-114. Accord *Vaughn*, 7 F.3d at 1536. Respondent did not do so. See J.A. 10-18. Indeed, while he has made it clear that his first preference would have been the sentence contemplated by the plea agreement, respondent has not made "any affirmative representation[]" at any stage of the case, *Dixon*, 308 F.3d at 235, that his second preference would have been to go to trial and run the risk of a sentence that was even longer than the one he received. Since respondent has never even *alleged* that the Rule 11 error affected his decision to

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[20] If the plea agreement *is* considered, it is even clearer that respondent cannot make that showing, because the omitted information was set forth in the plea agreement, Pet. App. 33a-34a; respondent acknowledged that he understood the agreement, both when he signed it, *id.* at 35a, and when he entered his plea, J.A. 62-63; and the district court found, as a fact, that that was so, J.A. 77.

plead guilty, it is difficult to see how that fact could be found to have been *established*. See *ibid.*; *Vaughn*, 7 F.3d at 1536; *Thibodeaux*, 811 F.2d at 848.

Second, it is not merely the case that respondent has made no statement indicating that he would have gone to trial if there had been strict compliance with Rule 11; he *has* made statements indicating that he would *not* have gone to trial. At a pre-trial conference shortly before his guilty plea, respondent stated unequivocally that he was not interested in going to trial and was concerned only with obtaining the most favorable possible plea bargain. "The only thing I'm looking for," he said, "is * * * a better deal. * * * At no time have I decided to go to any trial." J.A. 46-47. Cf. *Cannady*, 283 F.3d at 648 (in light of defendant's statements, including statement that "I don't want to go to trial," he could not show that Rule 11 error affected decision to plead guilty). Even at his sentencing, after he had become aware that he would not be eligible for the safety valve and was therefore subject to the ten-year mandatory minimum, respondent stated that he had "always accepted responsibility" for his crime, J.A. 112, a sentiment that is not consistent with a desire to fight the charges. Cf. *Coscarelli*, 105 F.3d at 996-997 (Jones, J., dissenting) (in light of defendant's statements, including statement that "I take responsibility," he could not show that he would have gone to trial if omitted Rule 11 advice had been given).

Third, even without a safety-valve reduction, the Sentencing Guidelines provided respondent with a substantial incentive to plead guilty. If he had gone to trial and been found guilty, respondent would almost certainly have been ineligible for the stipulated (Pet. App. 29a) three-level reduction for acceptance of responsibility. See Sentencing Guidelines § 3E1.1, com-

ment. (n.2). Without that reduction, his prison term would have been anywhere from 31 to 68 months longer than the 120-month sentence he received. See *id.* Ch. 5, Pt. A (offense level 32 and criminal history category III). And if respondent had been found guilty after a trial at which he testified perjuriously, see *id.* § 3C1.1, his sentence could have been between 68 and 115 months longer. See *id.* Ch. 5, Pt. A (offense level 34 and criminal history category III).

Fourth, respondent was also unlikely to have risked going to trial because the chances of acquittal were low. Respondent was caught in the act of delivering more than a kilogram of methamphetamine and he confessed to the crime after he was arrested. PSR ¶¶ 16-33. "In light of th[is] overwhelming evidence of his guilt," respondent cannot show that receipt of the omitted Rule 11 advice would have "altered his decision-making calculus." *Kelly*, 337 F.3d at 905. Accord, *e.g.*, *Molina-Uribe*, 853 F.2d at 1199.

Finally, while the district court did not advise respondent that he would be unable to withdraw his plea if he did not get the sentence he expected, the court did advise him, repeatedly, that the sentencing stipulations in the plea agreement were not binding on the court, J.A. 56-57, 69-71, 77, and that he was facing a ten-year mandatory minimum sentence if it determined that he was not eligible for the safety valve, J.A. 64-65.[21] The primary purpose of the Rule 11 requirement with which

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[21] The court also advised respondent that it was "not a party to th[e] plea agreement," J.A. 61; confirmed that no one had promised respondent that he would in fact qualify for the safety valve, J.A. 64; stated that respondent's eligibility for the safety valve was "subject to the Court's determination," J.A. 65; and referred to the safety valve as a "possibility," J.A. 69.

the district court did not comply is to ensure that the defendant understands that his plea agreement "involves only a recommendation or request not binding upon the court." Fed. R. Crim. P. 11(e)(2) advisory committee note (1979 Amendments), 18 U.S.C. App. at 1563. Consistent with this purpose, the fact that the district court advised the defendant that it was not bound by the parties' sentencing recommendation has figured prominently in several decisions holding that there was no effect on substantial rights when the district court did not also say that the defendant was bound by his plea if the recommendation was not followed. See *Noriega-Millán*, 110 F.3d at 167-168 (citing cases).[22] There is particular justification for that result when, as in this case, the defendant "does not contend that he was under the impression that he could withdraw his plea if the judge did not follow the government's recommendation." *Thibodeaux*, 811 F.2d at 848.

[22] The Ninth Circuit disagrees with these decisions. See Pet. App. 8a (quoting *Graibe*, 946 F.2d at 1434-1435).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

DAN HIMMELFARB
Assistant to the Solicitor General

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